STATE OF MICHIGAN
IN THE SUPREME COURT OF THE STATE OF MICHIGAN

ERIC L. VANDUSSEN,

Plaintiff,

v

JACKSON COUNTY 4TH CIRCUIT COURT JUDGE THOMAS WILSON,

Defendant.
_____/

Case No. _____

ERIC L. VANDUSSEN
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_____/

BRIEF IN SUPPORT

ORAL ARGUMENTS REQUESTED

BRIEF IN SUPPORT OF EMERGENCY COMPLAINT FOR WRIT OF SUPERINTENDING CONTROL AND FOR ORDER TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE HELD IN CONTEMPT OF THE SUPREME COURT

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JURISDICTION

This Court has jurisdiction to exercise superintending control over Defendant.

Plaintiff is alleging in this original action that Defendant has repeatedly violated Michigan Supreme Court Administrative Order 1989-1, which states that a "trial judge's decision to terminate, suspend, limit, or exclude film or electronic media coverage is not appealable, by right or by leave." AO 1989-1(2)(a)(iv)

MCR 3.302 indicates, in pertinent part, that:

> (A) Scope. A superintending control order enforces the superintending control power of a court over lower courts or tribunals.
>
> (B) Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule (D)(2), and MCR 7.101(A)(2), and 7.306(A).
> [...]
> (D) Jurisdiction.
>
> (1) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts or tribunals.
>
> (2) When an appeal in the Supreme Court, the Court of Appeals, or the circuit court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.

MCR 7.303(B) states that:

> The Supreme Court may [...]
>
> (5) exercise superintending control over a lower court or tribunal (see MCR 7.306);
>
> (6) exercise other jurisdiction as provided by the constitution or by law.

MCR 7.306 specifically relates to "ORIGINAL PROCEEDINGS" and it indicates, in

pertinent part:

> (A) Superintending Control. A complaint may be filed to invoke the Supreme Court's superintending control power:
>
> > (1) over a lower court or tribunal, including the Attorney Discipline Board, when an application for leave to appeal could not have been filed under MCR 7.305 [...]
>
> (B) A complaint may be filed to invoke the Supreme Court's original jurisdiction under Const 1963, art 4, § 6(19).

Const 1963 Article VI § 4 states that "the supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; …"

Plaintiff has no adequate legal remedy to challenge the administrative actions of Defendant other than a complaint seeking a writ of superintending control and there is no other feasible avenue for Plaintiff to rectify the Defendant's repeated violations of Michigan Supreme Court Administrative Order 1989-1.

QUESTION PRESENTED

I. Should this Court assume superintending control over Defendant and Order Defendant to perform his clear legal duty under AO 1989-1 when Defendant determines whether to grant or deny Plaintiff's request to film and record Defendant's courtroom proceedings?

Plaintiff says: Yes.

II. Should this Court Enter an immediate injunction that directs Defendant to permit Plaintiff to film and record Defendant's court proceedings regarding the Musico, Morrison, Bellar trial, which is scheduled to commence on October 3, 2022?

Plaintiff says: Yes.

INTRODUCTION

In this action for superintending control Plaintiff Eric L. VanDussen requests that this Court issue Orders to compel Defendant's compliance with Michigan Supreme Court Administrative Order No. 1989-1, [as amended December 5, 2012, effective January 1, 2013][1]

Plaintiff is in the process of compiling high-quality video and audio footage of court proceedings for a documentary he intends to produce regarding the conspiracy to kidnap Michigan Governor Gretchen Whitmer. Plaintiff recognizes that courts have important and competing duties both to ensure the parties' right to a fair trial and to preserve the public's and the media's right of access to criminal proceedings.

Plaintiff is a freelance journalist and videographer who has been researching and reporting on the conspiracy to kidnap Michigan Governor Gretchen Whitmer, since October of 2020.[2]

Pete Musico, Joseph Morrison and Paul Bellar "are three of several men arrested on domestic terrorism charges after a joint operation by state and federal authorities in early October exposed a plot that included targeting law enforcement officers, threatening violence to incite a civil war, planning an attack on the state Capitol building and kidnapping government officials, including Gov. Gretchen Whitmer."[3]

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[1] (See: https://www.courts.michigan.gov/4a67b3/siteassets/rules-instructions-administrative-orders/administrative-orders/administrative-orders.pdf / pages 80-82, last accessed on 09/28/2022)

[2] (See: Lawmakers, police, governor warned in May about armed militia, threats – October 10, 2020: https://www.record-eagle.com/news/local_news/lawmakers-police-governor-warned-in-may-about-armed-militia-threats/article_5fb79f72-0a62-11eb-91ca-cbaf8bb468f0.html (last accessed on 09/28/2022) &
Who is Wolverine Watchmen Attorney Nicholas Somberg? – February 12, 2022:
https://medium.com/@ericlvandussen/who-is-wolverine-watchmen-attorney-nicholas-somberg-49dc6383a5fc
(last accessed on 09/28/2022)

[3] (See: https://www.michigan.gov/ag/news/press-releases/2021/03/29/members-of-wolverine-watchmen-to-stand-trial - last accessed on 09/28/2022)

On August 23, 2022, the Detroit News published an article entitled "Two ringleaders convicted on Whitmer kidnapping conspiracy charges" and they reported, in part, that

> A federal jury Tuesday convicted two men accused of orchestrating a plan to kidnap Gov. Gretchen Whitmer as prosecutors salvaged the largest domestic terrorism case in a generation that has shed light on political extremism in Michigan.
>
> The convictions came on Whitmer's birthday, four months after jurors deadlocked on charges against Potterville resident Adam Fox and Delaware truck driver Barry Croft and acquitted two others who were accused of being part of a broader group of people angered by pandemic restrictions and hoping to spark a second Civil War. Fox and Croft face up to life in federal prison. […][4]

[4] See: https://www.detroitnews.com/story/news/local/michigan/2022/08/23/michigan-whitmer-kidnapping-conspiracy-plot-barry-croft-adam-fox/7865780001/ - last accessed on 09/28/2022)

FACTS

Plaintiff is "Media" or [a] "media agency" [which is defined as] "any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, professional journal, or other news reporting or news gathering agency." AO 1989-1(1)(b)

On September 12, 2022, Plaintiff filed three Requests and Notices for Film and Electronic Media Coverage of Court Proceeding forms with the Jackson County Clerk regarding the upcoming trail of PETE MUSICO, JOSEPH MORRISON, and PAUL BELLAR, File Nos. 20-3173-FH, 20-3172-FH & 20-3171-FH.[5]

On September 20, 2022, Defendant entered an Order, which was served on Plaintiff by email, and it indicated, in pertinent part, that:

> **IT IS SO ORDERED, that <u>the request to film or record</u> the Court proceedings <u>is denied</u>, as the proceedings will be broadcasted on YouTube.** [emphasis added][6]

On September 21, 2022, Plaintiff filed three additional Requests and Notices for Film and Electronic Media Coverage of Court Proceeding forms with the Jackson County Clerk regarding a pretrial hearing scheduled to be held in the above-described criminal cases on September 27, 2022, at 10:30 AM.[7]

Defendant's September 22, 2022, Order indicated, in pertinent part:

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[5] (See: EXHIBITS 1a, 1b & 1c, which are attached to Plaintiff's EMERGENCY COMPLAINT FOR WRIT OF SUPERINTENDING CONTROL …)
[6] (See: EXHIBIT 2, which is attached to Plaintiff's EMERGENCY COMPLAINT FOR WRIT OF SUPERINTENDING CONTROL …)
[7] (See: EXHIBITS 4a, 4b & 4c, which are attached to Plaintiff's EMERGENCY COMPLAINT FOR WRIT OF SUPERINTENDING CONTROL …)

> **IT IS SO ORDERED, that the request to film or record the Court proceedings is denied, as the proceedings will be broadcasted on YouTube so in court filming or recording is not necessary.** [emphasis added][8]

As more fully explained in the Emergency Complaint for Superintending Control filed in this matter, on September 28, 2022, Defendant denied Plaintiff's Emergency Motion for Reconsideration[9] pertaining to Defendant's September 20, 2022, media access denial Order.

[8] (See: EXHIBIT 7, which is attached to Plaintiff's EMERGENCY COMPLAINT FOR WRIT OF SUPERINTENDING CONTROL …)

[9] (See: https://archive.org/download/vandussen-productions-motion-for-reconsideration-of-order-denying-media-access-by-jackson-cc-09-21-22/vandussen-productions-motion-for-reconsideration-of-order-denying-media-access-by-jackson-cc-09-21-22.pdf / last accessed on 09/28/2022)

LEGAL STANDARD

I. Michigan Supreme Court's superintending control power

Const 1963 Article VI § 4 states that "the supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; …"

Complaints for orders of superintending control are "an original civil action designed to order a lower court to perform a legal duty." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 346–47; 675 NW2d 271, 289 (2003). Issuing such an order is appropriate when "a lower court exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, or [otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*, 273 Mich App 594, 598; 733 NW2d 65, 68 (2007). The "plaintiff seeking an order of superintending control bears the burden of establishing the grounds for issuing the order." *In re Gosnell*, 234 Mich App 326, 342; 594 NW2d 90, 98 (1999). To obtain an order of superintending control, the plaintiff must show (1) that a lower court "has failed to perform a clear legal duty" and (2) "the plaintiff is otherwise without an adequate legal remedy." *Id.* A plaintiff is without an adequate legal remedy when it lacks the ability to appeal. *Fort v City of Detroit*, 146 Mich App 499, 503; 381 NW2d 754, 756 (1985).

The power to issue orders of superintending control is provided under MCR 3.302. An order of superintending control may not be used as a substitute for an appeal. *Pub Health Dep't v Rivergate Manor*, 452 Mich 495, 500-501; 550 NW2d 515 (1996). In addition, to obtain an order of superintending control, a party must establish that the inferior tribunal failed to perform a clear legal duty and that there is no adequate legal remedy. *Gosnell*, 234 Mich App at 341.

A complaint for superintending control "is the proper vehicle to challenge the general practices of an inferior court." *Lockhart v Thirty-Sixth Dist Court Judge*, 204 Mich App 684, 688; 516 NW2d 76 (1994). This Court "has a general superintending control over all inferior courts and tribunals" within its jurisdiction, including the Defendant's court. "A superintending control order enforces the superintending control power of a court over lower courts or tribunals." MCL 3.302(A).

"The standard for issuing a writ of superintending control is to determine whether the lower court failed to perform a clear legal duty." *Frederick v Presque Isle Co Circuit Judge*, 439 Mich I, 15; 476 NW2d 142 (1991). Additionally, the plaintiff must establish "the absence of an adequate legal remedy." *Recorder's Court Bar Ass 'n v Wayne Circuit Court*, 443 Mich 110, 134; 503 NW2d 885 (1993).

As explained below, all requirements for the issuance of superintending control orders are satisfied in this case.

II. Michigan Supreme Court Administrative Order No. 1989-1

The Michigan Judiciary's website directs that "Administrative Orders are entered by the Michigan Supreme Court and are meant to guide trial courts on administrative matters. …"[10]

Michigan Supreme Court Administrative Order No. 1989-1, [as amended by order of December 5, 2012, effective January 1, 2013] regulates "Film or Electronic Media Coverage of Court Proceedings and it mandates, in pertinent part, that:

> **The following guidelines <u>shall</u> apply to film or electronic media coverage of proceedings in Michigan courts:**

[10] (See: https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/administrative-orders/ - last accessed on 09/28/2022)

[...]

2. Limitations.

(a) In the trial courts.

(i) **Film or electronic media coverage shall be allowed upon request in all court proceedings.** Requests by representatives of media agencies for such coverage must be made in writing to the clerk of the particular court not less than three business days before the proceeding is scheduled to begin. A judge has the discretion to honor a request that does not comply with the requirements of this subsection. The court shall provide that the parties be notified of a request for film or electronic media coverage.

(ii) **A judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion, that the fair administration of justice requires such action**, or that rules established under this order or additional rules imposed by the judge have been violated. **The judge has sole discretion to exclude coverage of certain witnesses, including** but not limited to the victims of sex crimes and their families, **police informants, undercover agents, and relocated witnesses.**

(iii) Film or electronic media coverage of the jurors or the jury selection process shall not be permitted.

(iv) A trial judge's decision to terminate, suspend, limit, or exclude film or electronic media coverage is not appealable, by right or by leave.

[...]

4. Equipment and Personnel. Unless the judge orders otherwise, the following rules apply:

(a) Not more than two videotape or television cameras, operated by not more than one person each, shall be permitted in any courtroom.

[...]

> (d) Media agency representatives shall make their own pooling arrangements without calling upon the court to mediate any dispute relating to those arrangements. In the absence of media agency agreement on procedures, personnel, and equipment, the judge shall not permit the use of film or electronic media coverage.
>
> 6. Location of Equipment and Personnel.
>
> **(a) Television camera equipment and attendant personnel shall be positioned in such locations in the courtroom as shall be designated by the judge.** Audio and video tape recording and amplification equipment which is not a component of a camera or microphone shall be located in a designated area remote from the courtroom.
>
> [...]
>
> **(d) Representatives of the media agencies are invited to submit suggested equipment positions to the judge for consideration.** [emphasis added]

MCR 8.116(D) relates to "Access to Court Proceedings" and it mandates that:

> (1) Except as otherwise provided by statute or court rule, **a court may not limit access by the public to a court proceeding unless**
>
> > (a) **a party has filed a written motion that identifies the specific interest to be protected, or the court sua sponte has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access**;
> >
> > (b) **the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest**; and
> >
> > (c) **the court states on the record the specific reasons for the decision to limit access to the proceeding.** [emphasis added]

In *VanDussen v. Court of Appeals*, 796 N.W.2d 255 (2011), Michigan's Supreme Court issued an Order on April 27, 2011, indicating:

> On order of the Court, [Eric VanDussen's] motion for immediate consideration is GRANTED. The complaint for superintending control is

> considered and, in lieu of granting relief at this time, we REMAND this case to the Court of Appeals to articulate the reason why "the fair administration of justice" warrants the denial of the plaintiff's request to film oral argument on May 10, 2011. Administrative Order 1989–1(2)(b).
>
> We retain jurisdiction. On remand, the Court of Appeals shall issue an order on or before May 2, 2011, and shall immediately file a copy of that order with the Clerk of the Supreme Court. **(EXHIBIT 1)**

On May 2, 2011, Michigan's Court of Appeals issued a responsive Order in the *VanDussen v. Court of Appeals* case, and they held that:

> On remand, we are directed to "articulate the reason why 'the fair administration of justice' warrants the denial of the plaintiffs request to film oral argument on May 10, 2011," in the case of *People v Anderson*, Court of Appeals Docket No. 300641. *VanDussen v Court of Appeals*, — Mich — (Docket No. 142950, issued April 27, 2011). We begin by noting that the remand order assumes that we denied the request pursuant to Administrative Order 1989-1(2)(b). Up to this point, however, we have not issued a written order in response to plaintiff's request. Rather, as has been the practice of the Court of Appeals, because no appeals either "by right or by leave" are permitted pursuant to Administrative Order 1989-l(2)(d), plaintiff was notified verbally by the Court's District Clerk that his application was denied. In any event, the application in this case was originally denied because we concluded that, based upon the minimal material submitted, plaintiff was neither the "media" nor a "media agency" as defined by Administrative Order 1989-1(1)(b).
>
> However, since the issuance of the remand order we requested plaintiff to submit information relative to our concern, and he has submitted fairly voluminous material indicating that he is a free-lance journalist whose work has appeared in several general news publications and on some mainstream electronic media outlets. Based on this detailed information, we conclude that plaintiff meets the definition of "media" as he falls within the phrase "any person. . .engaging in news gathering," and so his request to record oral argument is GRANTED in accordance with the rules provided in Administrative Order 1989-1. **(EXHIBIT 2)**

Following a jury trial in Oakland County Circuit Court in 1995, Jason Graves was convicted of first-degree premeditated murder and first-degree felony murder. The trial court

judge vacated the premeditated murder conviction, and sentenced him to life imprisonment without the possibility of parole for the first-degree felony murder conviction. Graves filed an appeal of right in the Michigan Court of Appeals, (COA) presenting the following claims that are relevant in this action:

> IV. Was Jason Graves denied his constitutional right to a fair and impartial trial when the media was allowed to videotape the proceedings for television broadcast when the defendants, their families, and the jurors objected to the presence of the video camera in the courtroom?
>
> V. Did the trial court deny defendant Graves a fair and impartial trial by entering into a secret agreement with the media to allow the media to videotape trial exhibits for broadcast without notice or an opportunity to be heard for objection to such publication?

The Appellee, Oakland County Prosecutor's Office, filed a brief with the COA on April 11, 1997, which asserted, in pertinent part:

> Defendant Graves has cited nothing to show that the cameras in the courtroom for a portion of the trial in this case compromised the ability of the jury to judge him fairly. His citation to the expression of concern of some of the jurors on the Graves jury and a concern by one juror that a television camera was pointed in the direction of the jury during opening statements does not even come close to showing an inability to fairly judge on the part of any or all of the jurors.
>
> Defendant Graves states that "[the jury was so focused on the presence of the media and their concern that they would he filmed, that they paid intense attention to the media camera," (Defendant-Appellant's Brief, 29.) However, such "intense attention" is not evident from the record of this case. if Defendant Graves felt that the jury was not paying attention to the evidence because of the media presence, it was incumbent upon him to request a hearing on the matter so that a record could be made for appellate purposes.
>
> Finally, the People would point out that, while the media's potential presence at the trial came up during the voir dire process, it was not a subject that necessitated lengthy discussions or questioning. Moreover, as already noted, after opening statements, there were no further references

> by anyone to the presence of television cameras in the courtroom.
>
> In sum, Judge Mester did not abuse his discretion in allowing television cameras to be present during the trial in this case. **(EXHIBIT 3)**

In an unpublished opinion, Michigan's Court of Appeals affirmed Graves' conviction. *People v. Graves*, 1999 WL 33451697, No. 191052 (March 30, 1999). The *Graves* Court opined, in relevant part, that:

> Graves contends that he was denied his right to a fair trial where the media was allowed to videotape the trial proceedings for television broadcast over the objections of defendants, their families and the jury. However, whether the media shall be allowed in the courtroom does not depend on the lack of an objection by defendants, their families or the jury. Rather, media coverage in the courtroom is controlled by AO 1989-1, which provides that film or electronic media coverage shall be allowed upon request in all court proceedings unless the trial court finds in the exercise of discretion that the fair administration of justice requires otherwise. See 432 Mich cxii. On review, a defendant must show that his right to a fair trial was prejudiced by the presence of the media. *Chandler v Florida*, 449 US 560, 581-581; 101 S Ct 802; 66 L Ed 2d 740 (1981). For instance, a defendant could establish prejudice by showing "that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that the[] trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast." *Id.* at 581.
>
> In this case, defendant contends that he was prejudiced because the jury was so focused on the cameras that it was unable to focus on the trial and the presentation of the evidence. However, in support of this contention, defendant notes only that on the second day of trial, a juror expressed a concern about cameras in the courtroom. The trial court responded to this concern by stating that the cameras "are not to take pictures of any jurors, they are to be focused solely on the witness stand, and they would be inconspicuous to the jury . . . ." The court also instructed the jury to be careful concerning the news programs they watched and to allow family members to peruse the newspaper first. Defendant also notes that on the third day of trial, another juror interrupted defense counsel's opening statement to inquire whether the camera was focusing on the jury. The court again explained that the cameras were not, and would not, be focused on the jury. Although the interruption of counsel's opening

> statement was somewhat unusual, the incidents relied on by defendant to establish prejudice were isolated, minor, brief and appropriately handled by the trial court. Moreover, defendant has failed to show that the cameras posed a problem once the actual evidentiary portion of the trial commenced. Accordingly **we conclude that defendant has failed to establish that the presence of cameras in the courtroom denied him a fair trial.**
>
> Next, Graves contends that he was denied a fair trial where the court allowed members of the media to remove exhibits (photographs of each defendant) from the prosecution table, tape these exhibits to the swinging door of the jury box, and film these exhibits for television broadcast. However, the jury was not present in [the] courtroom when this occurred. Although it appears that Yorks' photograph was broadcast, there is no indication that Graves' photograph was actually broadcast. Finally, defendant does not allege that any juror violated the court's instructions and saw any such broadcast. Accordingly, we find no abuse of discretion by the trial court, *In re People v Atkins*, 444 Mich 737, 739; 514 NW2d 148 (1994), or denial of the right to a fair trial on this ground." [emphasis added] **(EXHIBIT 4)**

In *Detroit Free Press v. Recorder's Court Judge*, unpublished MI COA Docket No. 148956 - Feb. 11, 1992, Michigan's Court of Appeals held, in pertinent part, that:

> Generally, film coverage shall be allowed in all court proceedings. Administrative Order No.1989-1, section 2(a).
> A judge may exclude film media coverage upon a finding, made and articulated on the record, that the fair administration of justice requires such action. AO 1989-1, section 2(b).
> The trial court has failed to articulate any valid reason for exclusion on the record, or in the pleadings filed in this Court. Prior to rendering a decision the trial court should consider sections 5(b) and 5(b) of the Administrative Order 1989-1. **(EXHIBIT 5)**

In *Detroit Free Press v. Thirty Sixth Dist. Judge*, unpublished MI COA Docket No. 170071 - May 14, 1996, Michigan's Court of Appeals held, in pertinent part, that:

> **By its terms, all Michigan courts are subject to and bound by AO 1989-1**. See, e.g., *Frederick v. Presque Isle Judge*, 439 Mich. 1, 9; 476 NW2d 142 (1991). Administrative orders are binding until changed or modified by the Supreme Court. *Detroit & Northern v. Woodworth*, 54

Mich.App 517, 520; 221 NW2d 190 (1974). The circuit court properly determined defendant's general and non-particularized policy of excluding photographic coverage violated his clear legal duty under AO 1989-1. The circuit court's initial order mandated compliance with AO 1989-1's requirement that denials of or limitations on timely requests for media coverage be articulated on the record, and precluded blanket exclusions of media coverage, in keeping with the AO's spirit that media coverage be allowed. [emphasis added] **(EXHIBIT 6)**

ARGUMENT

The first question in deciding an action for superintending control is whether the lower court failed to perform a clear legal duty. *Frederick*, supra, 439 Mich at 15. Defendant obviously has a clear legal duty under the guidelines found within AO 1989-1.

Defendant's general and non-particularized policy of excluding filming and recording of court proceedings violated Defendant's clear legal duty under AO 1989-1.

The second requirement for superintending control is the absence of "another adequate remedy." MCR 3.302(B).

Plaintiff has no other remedy because a "trial judge's decision to terminate, suspend, limit, or exclude film or electronic media coverage is not appealable, by right or by leave." AO 1989-1(2)(a)(iv)

The Defendant's arbitrary and capricious denials of Plaintiff's request to film court proceedings in the Jackson County Circuit Court do not even come close to complying with AO 1989-1(2)(a)(ii) because Defendant failed to "articulate on the record" any particularized "finding" of how or why the "fair administration of justice requires such action."

Expeditious and immediate consideration of this matter by this Court is absolutely necessary as Plaintiff is entitled to film and record Defendant's court proceedings regarding the Musico, Morrison, Bellar trial that is scheduled to begin on October 3, 2022, 2022.

CONCLUSION AND RELIEF REQUESTED

Based on the facts and law set forth above and documented in Plaintiff's Emergency Complaint, this Court should exercise superintending control over Defendant and order Defendant to comply with AO 1989-1. Plaintiff has no adequate legal remedy to challenge the administrative actions of Defendant other than a complaint seeking a writ of superintending control and there is no other available or feasible avenue for Plaintiff to rectify the Defendant's repeated violations of Michigan Supreme Court Administrative Order 1989-1.

Courts cannot simply override the binding mandates of AO 1989-1 just because they may utilize inferior recording equipment to stream some of their proceedings on YouTube or Zoom.

Numerous courts in high profile cases -- such as O.J. Simpson's trial, Casey Anthony's trial, and Derek Chauvin's trial employed less restrictive, but constitutionally permitted measures to prevent any potentially negative impact on the fair administration of justice during trials.

When media timely submits requests to film proceedings in Michigan courtrooms, AO 1989-1(2)(a)(i) dictates that "[f]ilm or electronic media coverage shall be allowed upon request in all court proceedings."

AO 1989-1(2)(a)(ii) provided that a "judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion, that the fair administration of justice requires such action …"

"Not more than two videotape or television cameras, operated by not more than one person each, shall be permitted in any courtroom." AO 1989-1(4)(a).

"Television camera equipment and attendant personnel shall be positioned in such locations in the courtroom as shall be designated by the judge. […] Representatives of the media

agencies are invited to submit suggested equipment positions to the judge for consideration." AO 1989-1(6)(a)&(d). Defendant's denial of Plaintiff's requests to film and record a pretrial hearing and the trail in this matter was not narrowly tailored to accommodate any interests to be protected, and there are much less restrictive means available to this Court to adequately and effectively protect those interests.

WHEREFORE, Plaintiff prays that this Honorable Court grant the following relief:

A. Grant Plaintiff's request for Immediate Consideration and forthwith Issue a Writ of Superintending Control over Defendant that prohibits Defendant from any further noncompliance with Supreme Court Administrative Order 1989-1;

B. Enter an immediate preliminary injunction that directs Defendant to permit Plaintiff to film and record Defendant's court proceedings regarding the Musico, Morrison, Bellar trial that is scheduled to commence on October 3, 2022;

C. Enter an Order to Show Cause why Defendant should not be held in contempt of the Supreme Court for Defendant's blatant refusal to comply with Supreme Court Administrative Order 1989-1;

D. Issue a Permanent Injunction directing Defendant to cease his practice of issuing arbitrary and capricious denials when media access requests are submitted to film or record Defendant's court proceedings;

E. Enter an Order granting any other relief as this Honorable Court sees fit.

Respectfully submitted,

September 28, 2022

/s/ Eric L. VanDussen

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* * *

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF IN SUPPORT OF EMERGENCY COMPLAINT FOR WRIT OF SUPERINTENDING CONTROL AND FOR ORDER TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE HELD IN CONTEMPT OF THE SUPREME COURT was served by email on September 28, 2022, upon:

Hon. Thomas D. Wilson
Jackson County 4th Circuit Court
twilson@mijackson.org &
ewatkins@mijackson.org

September 28, 2022 */s/ Eric L. VanDussen*

EXHIBIT 1

796 N.W.2d 255 (Mem)
Supreme Court of Michigan.

Eric L. VANDUSSEN, Plaintiff,

v.

COURT OF APPEALS, Defendant.

Docket No. 142950.
|
April 27, 2011.

Order

On order of the Court, the motion for immediate consideration is GRANTED. The complaint for superintending control is considered and, in lieu of granting relief at this time, we REMAND this case to the Court of Appeals to articulate the reason why "the fair administration of justice" warrants the denial of the plaintiff's request ***256** to film oral argument on May 10, 2011. Administrative Order 1989–1(2)(b).

We retain jurisdiction. On remand, the Court of Appeals shall issue an order on or before May 2, 2011, and shall immediately file a copy of that order with the Clerk of the Supreme Court.

All Citations

796 N.W.2d 255 (Mem)

EXHIBIT 2

Court of Appeals, State of Michigan

ORDER

Eric L. VanDussen v Court of Appeals

SC No. 142950

Joel P. Hoekstra
Presiding Judge

Christopher M. Murray

Michael J. Kelly
Judges

On remand, we are directed to "articulate the reason why 'the fair administration of justice' warrants the denial of the plaintiff's request to film oral argument on May 10, 2011," in the case of *People v Anderson*, Court of Appeals Docket No. 300641. *VanDussen v Court of Appeals*, __ Mich __ (Docket No. 142950, issued April 27, 2011). We begin by noting that the remand order assumes that we denied the request pursuant to Administrative Order 1989-1(2)(b). Up to this point, however, we have not issued a written order in response to plaintiff's request. Rather, as has been the practice of the Court of Appeals, because no appeals either "by right or by leave" are permitted pursuant to Administrative Order 1989-1(2)(d), plaintiff was notified verbally by the Court's District Clerk that his application was denied. In any event, the application in this case was originally denied because we concluded that, based upon the minimal material submitted, plaintiff was neither the "media" nor a "media agency" as defined by Administrative Order 1989-1(1)(b).

However, since the issuance of the remand order we requested plaintiff to submit information relative to our concern, and he has submitted fairly voluminous material indicating that he is a free-lance journalist whose work has appeared in several general news publications and on some mainstream electronic media outlets. Based on this detailed information, we conclude that plaintiff meets the definition of "media" as he falls within the phrase "any person...engaging in news gathering," and so his request to record oral argument is GRANTED in accordance with the rules provided in Administrative Order 1989-1.

COURT OF APPEALS OF THE STATE OF MICHIGAN 1965

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

MAY - 2 2011
Date

Chief Clerk

EXHIBIT 3

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

JASON ROBERT GRAVES,

Defendant-Appellant.

Court of Appeals
No. 191052

Circuit Court
No. 94-135924-FC

APPELLEE'S BRIEF

* * *

PROOF OF SERVICE

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

RICHARD H. BROWNE
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I. WHETHER THE TRIAL JUDGE DID NOT CLEARLY ERR BY ALLOWING DEFENDANT GRAVES' STATEMENT TO DETECTIVE HARVEY TO BE ADMITTED INTO EVIDENCE AT TRIAL?

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

II. WHETHER THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN THE MANNER IN WHICH HE CONDUCTED VOIR DIRE

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

III. WHETHER THE TRIAL JUDGE PROPERLY REFUSED TO INSTRUCT DEFENDANT GRAVES' JURY ON THE DEFENSE OF ACCIDENT?

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

IV. WHETHER THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING TELEVISION CAMERAS TO BE PRESENT DURING DEFENDANT GRAVES' TRIAL?

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

V. WHETHER THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING PHOTOGRAPHS OF DEFENDANT GRAVES AND DEFENDANT YORKS THAT HAD BEEN INTRODUCED INTO EVIDENCE AT TRIAL TO BE FILMED FOR BROADCAST ON TELEVISION AND WHETHER, IN ANY CASE, ANY ERROR IN THIS REGARD WAS HARMLESS ON THE FACTS OF THIS CASE BECAUSE THE PHOTOGRAPH OF DEFENDANT GRAVES WAS NEVER BROADCAST?

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

VI. WHETHER THE TRIAL JUDGE PROPERLY HANDLED DEFENDANT GRAVES' COMPLAINT REGARDING THE ACCURACY OF A TRANSCRIPT OF DEFENDANT GRAVES' STATEMENT TO THE POLICE?

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

VII. WHETHER THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING TWO CRIME SCENE PHOTOGRAPHS INTO EVIDENCE?

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

VIII. WHETHER DEFENDANT GRAVES SHOULD BE HELD TO HIS STIPULATION AT THE PRELIMINARY EXAMINATION THAT HIS STATEMENT TO DETECTIVE HARVEY WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE THAT HE COMMITTED THE OFFENSE OF FELONY MURDER FOR PURPOSES OF THE EXAMINATION AND WHETHER, IN ANY CASE, THE TRIAL JUDGE PROPERLY DENIED DEFENDANT GRAVES' MOTION TO QUASH THE INFORMATION?

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

IX. WHETHER THE TRIAL JUDGE PROPERLY DENIED DEFENDANT GRAVES' MOTION FOR DIRECTED VERDICT?

Defendant contends the answer should be, "no. "

The People contend the answer is, "yes. "

aware that Steven Jones might die and that any actions he did to assist Defendant Yorks were, in fact, contributing to Jones' death.

In sum, Judge Mester properly refused to instruct Defendant Graves' jury on the defense of accident.

IV. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING TELEVISION CAMERAS TO BE PRESENT DURING DEFENDANT GRAVES' TRIAL.

In his next claim in his brief on appeal, Defendant Graves argues that he "was denied his constitutional right to a fair and impartial trial when the media was allowed to videotape the proceedings for television broadcast when the Defendants, their families, and the jurors objected to the presence of the video camera in the courtroom." (Defendant-Appellant's Brief, 27.) The People respectfully submit that this claim is without merit.

Standard of Review:

Defendant's standard of review for this issue is incomplete and incorrect. Administrative Order 1989-1 states that it is within the discretion of the trial judge to allow electronic media coverage of a case.

Discussion:

During voir dire of Defendant Graves' jury, one of the potential jurors indicated that he was concerned that "this trial will probably become very public and I don't want to be public." (T, 89.) *Judge Mester responded that the media did not know his name and added the following:*

> That if there -- and we've already been contacted by all the media in the area. If there are -- I permit their cameras to come in here, they cannot show the jury. That is prohibited, prohibited by the Supreme Court of the State of Michigan because you did not

> volunteer to be here, you were brought here as being a citizen and asked to serve on a jury. So we try to keep you as incognito as possible.
>
> (T. 90.)

Judge Mester then indicated that he would not allow the jurors in this case to be contacted by the media as had occurred in the O.J. Simpson case. (T. 90.)

During voir dire for Defendant Yorks' jury, Judge Mester made the following statement to the potential jurors:

> One thing I do want to bring to your attention. We have been contacted by the media all over the place regarding this case and the Court has to make some determination as to -- to what extent the Court will permit them into the courtroom. If the Court decides to let any media into the Courtroom, your should understand that the media cannot photograph, cannot televise any juror, cannot refer to any juror by name, and therefore, *if they appear in the Courtroom, their* cameras will be focused solely on the witness stand and if I let them in the Courtroom, they'll be placed in a very inconspicuous position in the Courtroom so it'll not distract you or from this Court or the parties or the attorneys in this case. That's the decision the Court will *have to make. They will not* disrupt this case, they will not keep this case from being concluded within the two and a half weeks as I've committed myself to insure that it's completed, and you should all understand that.
>
> (Transcript 9-7-95, hereinafter T II, 63.)

After juries had been picked for both Defendant Graves and Defendant Yorks, Judge Mester, in the presence of both juries, indicated that the Defendant Graves' jury had indicated that they preferred that no cameras be allowed in courtroom. The following colloquy then occurred on the record:

> THE COURT: . . . Now the Graves jury has indicated that they prefer no cameras in the Courtroom, is that correct, is that the position that somebody has taken on that?
>
> [A JUROR]: It's a position I brought up. We never officially polled each other, but since we --

> *THE COURT:* Yeah. As I indicated to you earlier, it's clearly the discretion of the Court. The -- if cameras are permitted, they are not to take any pictures of any jurors, they are to be focused solely on the witness stand, and they would be inconspicuous to the jury, but I -- I will take into consideration that feeling you may have and I suspect several other jurors may have as well.
>
> (T II, 158.)

After the juries had been taken out of the courtroom, the attorney for Defendant Yorks stated that he objected to the presence of the media in the courtroom. (T II, 168.) The attorney for Defendant Graves joined in this objection. (T II, 168.) Judge Mester responded to the objections as follows:

> Fine, thank you. I'll take that into consideration and if there is media, we will minimize it as much as possible and ask that the media be respectful of the victim's family as well as each Defendant's family.
>
> (T II, 168.)

The next day, one of the jurors, during the opening statement to the jury by Defendant Graves' attorney, asked Judge Mester, "*Your Honor, is the camera focusing* over here?" (T III, 45.) Judge Mester replied, "It is not focused on you." (T III, 45.) The juror stated, "[o]kay" and Judge Mester stated that, "[t]hey cannot take -- and that's what I indicated to all of you earlier. It will not be a part of the jury box." (T III, 45.)

There appears to be no further references to the presence of cameras in the courtroom for the remainder of the trial. In fact, in his brief, Defendant Graves concedes that the cameras were only present for the first few days of the trial. (Defendant-Appellant's Brief, 29.)

Administrative Order 1989-1 permits film or electronic media coverage in all Michigan courtrooms as of March 1, 1989. Pursuant to subsection 2(b) of that order:

> A judge may terminate, suspend, limit, or exclude film or electronic

> media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion, that the fair administration of justice requires such action, or that rules established under this order or additional rules imposed by the judge have been violated. The judge has sole discretion to exclude coverage of certain witnesses, and their families, police informants, undercover agents, and relocated witnesses.

In Chandler v Florida, 449 US 560; 101 S Ct 802; 66 L Ed 2d 740 (1981), the United States Supreme Court addressed the question of whether a trial judge could, over the objection of a criminal defendant, allow electronic media coverage of a trial, including television coverage. The Court held that a trial judge could allow such coverage over the objection a defendant, but noted:

> [A] defendant has the right on review to show that the media's coverage of the his case–printed or broadcast–compromised the ability of the jury to judge him fairly. Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process.
>
> 101 S Ct at 813.

Defendant Graves has cited nothing to show that the cameras in the courtroom for a portion of the trial in this case compromised the ability of the jury to judge him fairly. His citation to the expression of concern of some of the jurors on the Graves jury and a concern by one juror that a television camera was pointed in the direction of the jury *during opening statements does not even* come close to showing an inability to fairly judge on the part of any or all of the jurors.

Defendant Graves states that "[t]he jury was so focused on the presence of the media and their concern that they would be filmed . . . that they paid intense attention to the media camera." (Defendant-Appellant's Brief, 29.) However, such "intense attention" is not evident from the record of this case. If Defendant Graves felt that the jury was not paying attention to the evidence because of the media presence, it was incumbent upon him to request a hearing on the matter so that a record

could be made for appellate purposes.

Finally, the People would point out that, while the media's potential presence at the trial came up during the voir dire process, it was not a subject that necessitated lengthy discussions or questioning. Moreover, as already noted, after opening statements, there were no further references by anyone to the presence of television cameras in the courtroom.

In sum, Judge Mester did not abuse his discretion in allowing television cameras to be present during the trial in this case.

V. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING PHOTOGRAPHS OF DEFENDANT GRAVES AND DEFENDANT YORKS THAT HAD BEEN *INTRODUCED INTO EVIDENCE AT TRIAL TO BE FILMED FOR BROADCAST* ON TELEVISION. IN ANY CASE, ANY ERROR IN THIS REGARD WAS HARMLESS ON THE FACTS OF THIS CASE BECAUSE THE PHOTOGRAPH OF DEFENDANT GRAVES WAS NEVER BROADCAST.

In his next claim in his brief on appeal, Defendant Graves claims that his right to a fair trial when Judge Mester allowed "the media to video tape trial exhibits for broadcast without notice or an opportunity to be heard for objection to such publication." (Defendant-Appellant's Brief, 29.) The People respectfully submit that this claim is without merit.

Standard of Review:

Defendant appears to be asserting in his brief on appeal that the decision to allow the media access to exhibits introduced at trial is reviewed for an abuse of discretion. The People agree with this standard of review.

Discussion:

During trial, the attorney for Defendant Graves indicated on the record (outside of the

presence of the jury) that two (2) cameramen had taken photographs of Defendant Graves and Defendant Yorks and filmed them. (T IV, 10.) He added that a photograph was shown on Channel Two's Ten O'Clock News that evening. (T IV, 12.) He indicated that they he was concerned about the impact that the broadcast of the photograph. (T IV, 12.) Judge Mester responded as follows:

> . . . Mr. Vince Wade did approach the Court as to whether or not these items were a matter of public record now that they were a part of the exhibits in this case, and the Court had indicated that as far as the Court was concerned they were; that they had wanted simply the pictures of the two individuals, Mr. Yorks and Mr. Graves. I did not object to that.
>
> (T IV, 11.)

The assistant prosecutor then placed the following statement on the record regarding the exhibits at issue:

> I just want to clarify for the record for -- and this is definitely for the record, that the photographs that I think were being used were Exhibits 5, 6, and 7 and these were the exhibits that had already been published to the jury during the course of trail on Friday. I -- I asked for permission and was given permission to show these photos to the jury, so the jury had seen these photos prior to the camera's filming the. I just want that to be made clear for the record. That's not something that the jury hadn't already seen.
>
> (T IV, 11-12.)

In a colloquy that followed between Judge Mester and Defendant Graves' attorney, it was revealed that the television news program at issue (Channel 2's Ten O'Clock News) had only broadcast the photograph of Defendant Yorks, not the photograph of Defendant Graves, who was only mentioned by name during the newscast. (T IV, 13.) Judge Mester concluded the discussion by indicating that he would keep the concern of the defense attorneys about trial exhibits in mind. (T IV, 14.) No further remedial actions was requested by either the attorney for Defendant Graves or the attorney for Defendant Yorks.

The United States Supreme Court has recognized that there is a common law right to inspect and copy judicial records and documents. Nixon v Warner Communications, 435 US 589; 98 S Ct 1306; 55 L Ed 2d 570 (1978). However, this right is not absolute and a court may exercise supervisory control over materials in its custody. 98 S Ct at 1312. It is within the discretion of a trial judge to allow the media access to exhibits introduced into evidence at trial. In re People v Atkins, 444 Mich 737, 739 (1994), quoting from United States v Beckham, 789 F2d 401, 409 (CA 6, 1986).

The People contend that Judge Mester did not abuse his discretion in allowing photographs of Defendants Graves and Yorks, which had been admitted at trial as exhibits, to be filmed by the media for broadcast on television. The People would point out that the exhibits had already been shown to the jury and there was, thus, no danger that either Defendant's right to a fair trial would be prejudiced even if the jurors had accidentally seen the photographs broadcast on television.

Defendant Graves complains that Judge Mester should have provided a "forum for discussion and/or objection" prior to allowing the media access to the exhibits. (Defendant-Appellant's Brief, 32.) However, he does not assert how such a "forum" would have altered Judge Mester's decision to allow the media access to the photographic exhibits. Moreover, his objection to the media's access to the exhibits was, nonetheless, placed on the record and preserved for appellate review.

In any case, any error made by Judge Mester in this regard would be harmless on the facts of this case. The photograph of Defendant Graves was not broadcast. Moreover, Defendant Graves has failed to show that he suffered any prejudice to his right to a fair trial by the fact that his name was mentioned during the same television news report in which the photograph of Defendant Yorks was broadcast. The People would again note that the jurors had already seen the photograph of

Defendant Yorks and were, in any case, admonished repeatedly to not watch any television news coverage of the case or read any newspaper accounts of the case.

In sum, Judge Mester did not abuse his discretion in allowing photographs of Defendant Graves and Defendant Yorks that had been introduced into evidence at trial to be filmed for broadcast on television. In any case, any error in this regard was harmless on the facts of this case because the photograph of Defendant Graves was never broadcast.

VI. THE TRIAL JUDGE PROPERLY HANDLED DEFENDANT GRAVES' COMPLAINT REGARDING THE ACCURACY OF A TRANSCRIPT OF DEFENDANT GRAVES' STATEMENT TO THE POLICE.

In his next claim in his brief on appeal, Defendant Graves argues as follows concerning the manner in which Judge Mester handled his complaint concerning the accuracy of the transcript of Defendant Graves' statement to Detective Harvey:

> The trial court abused its discretion in allowing the jury to have a transcript of the audio tape of Jason's statement while they listened to the tape when counsel objected to the accuracy of the transcript and the accuracy of the transcript was not established by any degree of certainty.
>
> (Defendant-Appellant's Brief, 32.)

The People respectfully submit that this claim is without merit.

Standard of Review:

The People concede that the standard of review for this issue cited in Defendant's brief is correct. The question of whether evidence is properly admitted is reviewed for an abuse of discretion. People v Crump, 216 Mich App 210, 211 (1996), lv den ___ Mich ___ (1997).

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by John S. Pallas, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court affirm Defendant's conviction and sentence in the Oakland County Circuit Court.

Respectfully submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

RICHARD H. BROWNE
INTERIM CHIEF, APPELLATE DIVISION

By: J.S. Pallas
JOHN S. PALLAS (P42512)
Assistant Prosecuting Attorney

DATED: April 9, 1997

EXHIBIT 4

1999 WL 33451697
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v.

Jason R. GRAVES, Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v.

David L. YORKS, Defendant-Appellant.

No. 191052, 191054.

|

March 30, 1999.

Before: MacKENZIE, P.J., and WHITE and SMOLENSKI, JJ.

Opinion

PER CURIAM.

*1 Defendants Jason Graves and David Yorks were each convicted of one count of first-degree premeditated murder, M.C.L. § 750.316(1)(a); MSA 28.548(1)(a), and one count of first-degree felony murder, M.C.L. § 750.316(1)(b); MSA 28.548(1)(b). The trial court vacated each defendant's conviction of premeditated murder and sentenced each defendant to the mandatory term of life in prison without parole for the felony murder conviction. After each defendant appealed as of right, this Court consolidated the appeals. We now affirm.

Defendants convictions arise out of the murder of a teenage boy during the course of a robbery of the boy's home.

Defendant Graves

Defendant Graves initially raises several grounds for his argument that the trial court erred in denying his motion to suppress the inculpatory statement he gave at the sheriff's department. Specifically, Graves first contends that his statement should have been suppressed because it was obtained when the police impermissibly reinitiated questioning at the sheriff's department after he had already invoked his privilege against self-incrimination at the scene of the crime.

The admissibility of statements obtained after a defendant has asserted the privilege against self-incrimination turns on whether, under the particular facts of the case, the police scrupulously honored the defendant's assertion of the right to cut off questioning. *People v. Slocum (On Remand)*, 219 Mich.App 695; 558 NW2d 4 (1996).

In this case, the evidence admitted at the suppression hearing reveals that when Graves invoked his privilege against self incrimination at the scene of the crime the officer who was attempting to question Graves immediately discontinued the attempted questioning. A substantial period of time (over two hours) thereafter elapsed before a different officer reinitiated

questioning at the sheriff's department during which time no efforts were made by the police to wear down Graves' resistance and make him change his mind. *Id.* at 698-700, 705. Between the time that Graves invoked his right against self incrimination at the scene of the crime and the police reinitiated questioning at the sheriff's department, significant new information (an inculpatory statement by York) became available to the police. Cf. *id.* at 705, n 3. And, the second officer who reinitiated questioning gave Graves a fresh set of warnings. Cf. *id.* at 700. We thus conclude that the totality of the circumstances indicates that the police "scrupulously honored" Graves' assertion of the "right to cut off questioning." *Id.* at 705. Accordingly, the trial court did not err in refusing to suppress Graves' statement on this ground.

Next, Graves contends that his inculpatory statement should have been suppressed because he invoked his right to counsel during questioning at the sheriff's department. However, we agree with the trial court that Graves did not invoke his right to counsel during questioning. The transcript of Graves' taped statement reveals that he was then willing to talk to the officer without an attorney and that he simply wanted to make sure that he was not waiving his right to have counsel present at some future time.[1] Cf. *People v. Granderson*, 212 Mich.App 673, 676; 538 NW2d 471 (1995). Moreover, even if Graves' statements could be construed as an ambiguous request for an attorney, the officer was not required to refrain from questioning Graves and his subsequent inclupatory statement was properly admitted. *Id.* at 677-678.

***2** Finally, Graves argues that his inculpatory statement should have been suppressed because he did not knowingly and intelligently waive his rights. Specifically, Graves contends that the record shows that he did not understand that by answering the officer's questions he was waiving his right to an attorney. Graves also contends that he was too intoxicated to waive his rights.

Statements given in response to custodial interrogation are not admissible unless the defendant was first given the warnings required by *Miranda v. Arizona*, 384 U.S. 436; 86 S Ct 1602; 16 L.Ed.2d 694 (1966), and the defendant then voluntarily, knowingly and intelligently waived the privilege against self incrimination. *Id.* at 444, 468-475; *People v. Howard*, 226 Mich.App 528, 538; 575 NW2d 16 (1997). Whether the waiver was voluntary and whether it was knowing and intelligent are two separate questions. *Colorado v. Spring*, 479 U.S. 564, 573; 107 S Ct 851; 93 L.Ed.2d 954 (1987); *Howard, supra.* A waiver will be found to be knowing and intelligent if the defendant understood both the "basic privilege guaranteed by the Fifth Amendment," i.e., that he could remain silent and consult with counsel, and the consequences of the decision to abandon the privilege and speak freely to the police, i.e., that anything he said could be used against him. See *Spring, supra* at 573-575; *People v. Cheatham*, 453 Mich. 1, 28-29 (Brickley, C.J., and Riley, J.), 44 (Weaver, concurring); 551 NW2d 355 (1996); *People v. Garwood*, 205 Mich.App 553, 558; 517 NW2d 843 (1994). The question whether a defendant validly waived his *Miranda* rights depends in each case on the totality of the circumstances surrounding the interrogation. *Cheatham, supra* at 27 (Boyle, J., with Brickley, C.J., and Riley, J.), 44 (Weaver, concurring). Although this Court engages in de novo review of the entire record, we will defer to a trial court's factual findings concerning the issue of waiver unless that ruling is clearly erroneous. *Id.* at 29-30 (Boyle, J., with Brickley, C.J., and Riley, J., concurring), 44 (Weaver, concurring).

In this case, the trial court found that Graves was not intoxicated at the time he waived his *Miranda* rights. After reviewing the record, including the testimony of all the police officers who came into contact with Graves both at the scene of the crime and at the sheriff's department, we conclude that the trial court's finding in this regard is not clearly erroneous. The transcript of Graves' taped statement indicates that Harvey did not have any trouble communicating with Graves and that Graves provided appropriate responses to Harvey's questions. The transcript shows that the officer read the advice-of-rights form to Graves and then had Graves himself read the form. Although he refused to sign the form, Graves expressly indicated that he understood the form, that he was willing to then talk to the officer without an attorney and that he just did not want to waive his right to have an attorney present during questioning at some future time. As noted by the trial court, "at no time did [Graves] demonstrate any lack of understanding ...." Accordingly, on this record, we conclude that the trial court correctly determined that Graves knowingly and intelligently waived his *Miranda* rights.

***3** In summary, we conclude that the trial court correctly refused to suppress Graves' inculpatory statement.

Next, Graves argues that the trial court's refusal to allow defense counsel to conduct voir dire prevented sufficient facts from being elicited during voir dire upon which to challenge the prospective jurors ability to serve impartially in this high profile case. In making this argument, Graves relies on the plurality opinions of Justice Mallett and Justice Levin in *People v. Tyburski*, 445 Mich. 606; 518 NW2d 441 (1994). However, even Justice Mallett's plurality opinion in *Tyburski* recognizes that the scope and conduct of voir dire is within the trial court's discretion and that a defendant does not have a right to have counsel conduct voir dire. *Id.* at 619 (Mallett, J., with Cavanagh, C.J., and Levin, J.). Our review of the record in this case reveals that during voir dire the trial court asked questions propounded by counsel and conducted individual and sequestered voir dire. The trial court allowed counsel to ask questions during sequestered voir dire. The trial court's questions concerning pretrial publicity were sufficiently probing to reveal a factual basis to challenge the potential jurors. The trial court did not rely on the potential jurors' own assessment of whether they could be fair and impartial. Rather, the trial court questioned the potential jurors at length to allow the court to reach its own conclusions concerning bias resulting from pretrial publicity. Accordingly, we conclude that the trial court did not abuse its discretion in the manner in which it conducted voir dire. See, generally, *Tyburski, supra.* We likewise find no merit to Graves' suggestion that the venire was tainted by certain prejudicial answers relating to the pretrial publicity in this case. *People v. Bell*, 209 Mich.App 273, 277-278; 530 NW2d 167 (1995).

Next, Graves argues that the trial court erred in refusing to give CJI2d 7.2 (Murder: Defense of Accident [Not Knowing Consequences of Act]). A trial court is required to give a requested instruction except when the theory is not supported by the evidence. *People v. Mills*, 450 Mich. 61, 81; 537 NW2d 909, modified and remanded 450 Mich. 1212 (1995). Graves contends that there was evidence admitted at trial that supported his requested instruction on the theory of accident. However, in support of this argument, Graves provides this Court with only three citations to record evidence. Specifically, Graves cites to the evidence of his statement in which he admitted giving Yorks a straight, white-handled, sharp object that was "like a knife." Graves also cites to the testimony of a witness that at some point during the incident he heard a voice, allegedly Graves' voice, say "If you don't stop you're going to kill him." However, rather than finding that this evidence supports the defense of accident, we agree with the prosecution that this evidence indicates that there was nothing accidental about the boy's death and that Graves was aware that the boy would probably die or suffer great bodily harm. See CJI2d 7.2. Graves also cites to the testimony of the same witness that at some point during the incident it sounded like there were a lot of people in the boy's home because there was a lot of running around upstairs and downstairs. However, we fail to understand how this testimony provides evidence for the defense of accident. Accordingly, we conclude that the trial court correctly denied Graves' requested instruction on the defense of accident.

*4 Next, Graves contends that he was denied his right to a fair trial where the media was allowed to videotape the trial proceedings for television broadcast over the objections of defendants, their families and the jury. However, whether the media shall be allowed in the courtroom does not depend on the lack of an objection by defendants, their families or the jury. Rather, media coverage in the courtroom is controlled by AO 1989-1, which provides that film or electronic media coverage shall be allowed upon request in all court proceedings unless the trial court finds in the exercise of discretion that the fair administration of justice requires otherwise. See 432 Mich. cxii. On review, a defendant must show that his right to a fair trial was prejudiced by the presence of the media. *Chandler v. Florida*, 449 U.S. 560, 581-581; 101 S Ct 802; 66 L.Ed.2d 740 (1981). For instance, a defendant could establish prejudice by showing "that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that the[ ] trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast." *Id.* at 581.

In this case, defendant contends that he was prejudiced because the jury was so focused on the cameras that it was unable to focus on the trial and the presentation of the evidence. However, in support of this contention, defendant notes only that on the second day of trial, a juror expressed a concern about cameras in the courtroom. The trial court responded to this concern by stating that the cameras "are not to take pictures of any jurors, they are to be focused solely on the witness stand, and they would be inconspicuous to the jury ...." The court also instructed the jury to be careful concerning the news programs they watched and to allow family members to peruse the newspaper first. Defendant also notes that on the third day of trial, another juror interrupted defense counsel's opening statement to inquire whether the camera was focusing on the jury. The court again explained that the cameras were not, and would not, be focused on the jury. Although the interruption of counsel's opening

statement was somewhat unusual, the incidents relied on by defendant to establish prejudice were isolated, minor, brief and appropriately handled by the trial court. Moreover, defendant has failed to show that the cameras posed a problem once the actual evidentiary portion of the trial commenced. Accordingly we conclude that defendant has failed to establish that the presence of cameras in the courtroom denied him a fair trial.

Next, Graves contends that he was denied a fair trial where the court allowed members of the media to remove exhibits (photographs of each defendant) from the prosecution table, tape these exhibits to the swinging door of the jury box, and film these exhibits for television broadcast. However, the jury was not present in courtroom when this occurred. Although it appears that Yorks' photograph was broadcast, there is no indication that Graves' photograph was actually broadcast. Finally, defendant does not allege that any juror violated the court's instructions and saw any such broadcast. Accordingly, we find no abuse of discretion by the trial court, *In re People v. Atkins*, 444 Mich. 737, 739; 514 NW2d 148 (1994), or denial of the right to a fair trial on this ground.

***5** Next, Graves contends that the trial court abused its discretion in allowing the jury to have a copy of the transcript of the audio tape of Graves' statement while it listened to this tape where the accuracy of the transcript was never established to any degree of certainty. We make clear that under the circumstances of this case we do not necessarily disapprove of the manner in which the trial court handled defense counsel's objection to the accuracy of the transcript, made as it was on the eleventh day of trial. Rather, we assume for purposes of analysis only that the trial court's handling of this issue did not comply with the procedures set forth in *People v. Lester*, 172 Mich.App 769, 776; 432 NW2d 433 (1988) (requiring a trial court to independently ensure the accuracy of a transcript of a tape recording in the absence of a stipulation). However, even assuming such preserved nonconstitutional error, we note that defense counsel conceded below that he had studied the tape for a great period of time and that except for the nine or ten inaccuracies in the transcript that he identified and that were corrected before the transcript was given to the jury he could not specifically identify any other inaccuracies in the transcript. Even on appeal, defendant fails to specify any further inaccuracies in the transcript that were not corrected below. Most significantly, the jury listened to the actual tape while it followed along with the transcript. Thus, on this record, we are satisfied that it is highly probable that any preserved nonconstitutional error by the court did not affect the verdict. *People v. Graves*, 458 Mich. 476, 487; 581 NW2d 229 (1998).

We briefly address Graves' remaining issues. In deciding to admit certain photographs, the trial court conducted the appropriate evidentiary analysis. We find no error. See, generally, *Mills, supra.* At the preliminary examination, Graves stipulated that his statement supplied enough factual detail to support a finding of probable cause with respect to the charge of felony murder. The subsequent suppression hearing focused only on the admissibility of this statement. Thus, we conclude that the trial court did not err in denying Graves' motion to quash. *People v. Northey*, 231 Mich.App 568, 574; ___ NW2d ___ (1998). Finally, viewing the evidence in the record at the time Graves moved for a directed verdict in a light most favorable to the prosecution, we conclude that there was sufficient evidence from which a rational trier of fact could have found that Graves, either as a principal or as an aider and abettor, was guilty beyond a reasonable doubt of the crimes of first-degree premeditated murder and first-degree felony murder. *People v. Marsack*, 231 Mich.App 364, 370-371; 586 NW2d 234 (1998); *People v. Turner*, 213 Mich.App 558, 566-568; 540 NW2d 728 (1995). Thus, the trial court did not err in denying Graves' motion for a directed verdict. *People v. Lemmon*, 456 Mich. 625, 633-634; 576 NW2d 129 (1998).

***6** In summary, in docket number 191052, we affirm.

Defendant Yorks

Yorks first argues that the trial court erred in failing to suppress statements he made at the scene of the crime and the sheriff's department. Yorks contends that these statements should have been suppressed because he was too intoxicated at the time he made these statements to have voluntarily, knowingly and intelligently waived his *Miranda* rights.

We have previously stated the law in this opinion concerning the issue whether a defendant knowingly and intelligently waived his *Miranda* rights. The determination whether a defendant's waiver was voluntary in the *Miranda* context is the same as the determination whether a defendant's statement itself was voluntary in the Fourteenth Amendment confession context. *Colorado v. Connelly*, 479 U.S. 157, 169-170; 107 S Ct 515; 93 L.Ed.2d 473 (1986). Whether a defendant's statement was involuntary in the Fourteenth Amendment confession context depends on the totality of the circumstances. *Culombe v. Connecticut*, 367 U.S. 568, 602; 81 S Ct 1860; 6 L.Ed.2d 1037 (1961); see also *People v. Sexton*, 458 Mich. 43, 67-68; 580 NW2d 404 (1998) (citing *People v. Cipriano*, 431 Mich. 315, 334; 429 NW2d 781 [1988]). In *Cipriano, supra*, our Supreme Court, citing *Culombe*, enumerated a number of factors that may be considered in determining whether a defendant's statement was involuntary:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

However, above all else, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Connelly, supra* at 167. The fact that a defendant has a deficiency will not render a statement involuntary within the meaning of due process unless the deficiency is exploited by the police with coercive tactics. *Id.* at 165-167; see also *People v. Fike*, 228 Mich.App 178, 182; 577 NW2d 903 (1998).

The voluntariness of a statement is a question for the trial court. *Sexton, supra* at 68. An appellate court must give deference to a trial court's factual findings at a suppression hearing and will not reverse such findings unless they are clearly erroneous. *Arizona v. Fulminante*, 499 U.S. 279, 287; 111 S Ct 1246; 113 L.Ed.2d 302 (1991); *Cheatham, supra* at 30 (Boyle, J., with Brickley, C.J., and Riley, J., concurring), 44 (Weaver, concurring); *Howard, supra* at 543. However, because the ultimate issue of voluntariness is a legal question, an appellate court must nevertheless examine the entire record and make an independent determination of voluntariness. *Fulminante, supra; Sexton, supra; Howard, supra.*

*7 In this case, the trial court found that Yorks was not intoxicated. After reviewing the record, including the testimony of all the police officers who observed Yorks that morning, whom the trial court found credible, we conclude that the trial court's finding in this regard was not clearly erroneous. Where there was no intoxication for the police to exploit and where Yorks does not allege any other coercive conduct by the police, we conclude that the trial court correctly determined that Yorks voluntarily waived his *Miranda* rights. We note also that Yorks was given his *Miranda* rights several times and indicated several times that he understood his rights. There is likewise no indication that Yorks had any trouble communicating with any of the officers. We thus conclude that the trial court did not err in determining that Yorks knowingly and intelligently waived his *Miranda* rights. Accordingly, the trial court did not err in denying Yorks' motion to suppress.

Next, Yorks argues that his statements to the police should have been suppressed because the police failed to electronically record these statements, thereby denying him due process of law under the Michigan Constitution. However, this Court recently rejected this precise argument in *Fike, supra* at 183-186.

Finally, Yorks raises the same challenge to the manner in which the trial court conducted voir dire as that raised by Graves. For the reasons stated in our previous discussion of this issue, we reject Yorks' challenge in this regard.

In summary, in docket number 191054, we affirm.

All Citations

Not Reported in N.W.2d, 1999 WL 33451697

Footnotes

1 Specifically, the relevant portion of this transcript is as follows:

> *Officer Harvey:* Time is 8:40 a.m. Date is October 16, 1994. Present are myself, detective sergeant Harvey, officer Spadafore of the Oxford Police Department and Jason Graves.
>
> Jason, we've sat down and we've talked for a couple minutes and I've just explained to you what I do for a living and I told you I was going to set some parameters down, okay. One of those parameters being, that whatever I say here, whatever dealings I have with you, are going to be the truth. They will be nothing but the truth. They'll be no misleading. I'm not going to color, I'm not going to gloss things over. I'm not going to trick you, okay. Um ... it's just fair that way because whatever ... whatever we do here, we answer for later on. We have to explain later on, and I explained to you about facts and about why. The element of why. Why something occurs. How could this have occurred? Okay. Um ... I want to ask specific questions, I don't know. Some of the questions I already know the answers to, I'm going to ask them to see if you're telling me the truth, okay?
>
> *Defendant Graves:* Alright.
>
> *Officer Harvey:* Some of them I'm not going to know. You are going to have to tell me. I can't say what went on inside of Jason's mind, only Jason can do that. Is that fair enough?
>
> *Defendant Graves:* Yes.
>
> *Officer Harvey:* Alright, do you feel more comfortable now that we have this on tape and ...
>
> *Defendant Graves:* It doesn't matter.
>
> *Officer Harvey:* Yeah, it does ... Yeah, it does.
>
> *Defendant Graves:* I can write it, and I can ... (Inaudible)
>
> *Officer Harvey:* No, but we may do that later on. Before we ask specific questions, Jason, I have to do this and I believe it's already been done once before tonight. Okay, but I want to do it one more time. This is an advice of rights. This is the same thing I got to tell anybody whenever I speak to them and ask them specific questions about an incident.
>
> *Defendant Graves:* Alright.
>
> *Officer Harvey:* Okay. Before we may ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer for advise [sic] before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer one will be appointed for you for any questioning if you wish. If you decide to answer questions now, without a lawyer present, you still have the right to stop answering at anytime. You also have the right to stop answering anytime until you talk to a lawyer. Those are your rights.
>
> Below here is a paragraph waiver of rights. I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.
>
> That pretty well straight forward English? No problems?
>
> *Defendant Graves:* No problems.
>
> *Officer Harvey:* Do you know what coercion is ? What is it?
>
> *Defendant Graves:* Coercion? Say the word again.
>
> *Officer Harvey:* Coercion.

Defendant Graves: What?

Officer Harvey: Okay. I think you do but just don't know how to put it. You know what it is, but you can't explain it.

Defendant Graves: I can't explain it.

Officer Harvey: What coercion is is, me forcing you to do something, not through physical violence.

Defendant Graves: In any form.

Officer Harvey: Right. It's another form, it's a, it's a psychological form. It's a manipulation, okay. I'm not here playing games. I'm not here ... There are no threats done, what so ever. Um ... and I'm not forcing you to do anything psychologic [sic]. I'm not playing games in your head. Is that fair enough ...

Defendant Grave: Yes.

Officer Harvey: Uh ... definition? Okay, why don't you read this over.

Defendant Graves: Just like, right here?

Officer Harvey: Yup, just like right there. This is probably a little bit clearer form. Okay?

Defendant Graves: Uh-huh.

Officer Harvey: Alright, did you have any problems with any of that?

Defendant Graves: No.

Officer Harvey: Okay. At this time, when we go into the why's, are you willing to talk to me? You can stop me at any time that you feel uncomfortable.

Defendant Graves: I'm willing to talk, but I don't want to sign this paper cause I'd like to have a lawyer, but I will answer any questions, but ...

Officer Harvey: You don't want to sign that right now.

Defendant Graves: I want ...

Officer Harvey: That's fine, you don't have to sign it.

Defendant Graves: I want to, I have the right to still have a lawyer?

Officer Harvey: Sure, sure. The question is, Jason, are you willing to talk to me now and then talk to a lawyer later?

Defendant Graves: Yes.

Officer Harvey: Okay. You don't need to sign that, I just need to know that you understand all that.

Defendant Graves: Right. I understand it.

Officer Harvey: Okay.

Defendant Graves: I just don't want to waive my right to not have a lawyer at any particular time during questioning.

Officer Harvey: That's fine, and at any time that you feel uncomfortable with me or uncomfortable with the situation, you can always stop me. Is that fair enough?

Defendant Graves: I don't feel uncomfortable.

Officer Harvey: Okay, that's fine.

End of Document

EXHIBIT 5

1992 WL 12537723
Only the Westlaw citation is currently available.

Court of Appeals of Michigan.

DETROIT FREE PRESS

v.

RECORDER'S COURT JUDGE.

Docket No. 148956.

Feb. 11, 1992.

ORDER

CONNOR, J.

*1 The Court orders that the motion for immediate consideration is GRANTED.

The Court further orders that the motion for superintending control is GRANTED.

This matter is remanded to the trial court to consider the request by petitioner Detroit Free Press, Inc, to permit still photography in the case now pending before the court.

Generally, film coverage shall be allowed in all court proceedings. Administrative Order No.1989-1, section 2(a).

A. judge may exclude film media coverage upon a finding, made and articulated on the record, that the fair administration of justice requires such action. AO 1989-1, section 2(b).

The trial court has failed to articulate any valid reason for exclusion on the record, or in the pleadings filed in this Court. Prior to rendering a decision the trial court should consider sections 5(b) and 5(b) of the Administrative Order 1989-1.

We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 1992 WL 12537723

EXHIBIT 6

1996 WL 33364376

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

DETROIT FREE PRESS, Plaintiff-Appellee,

v.

THIRTY SIXTH DISTRICT JUDGE, Defendant-Appellant.

Docket No. 170071.

|

LC No. 92-222840-AS.

|

May 14, 1996.

Before: MACKENZIE, P.J., and WHITE and M.W. LABEAU,* JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Defendant appeals the circuit court's supplemental order of superintending control, entered following the circuit court's determination that defendant had violated an earlier order granting writ of superintending control, pertaining to defendant's handling of requests for media coverage of proceedings in his courtroom. We conclude that although the circuit court did not err in concluding it had authority to exercise superintending control and did not abuse its discretion in determining defendant had violated the initial writ, the supplemental order is overly broad. We thus affirm in part and vacate in part.

Plaintiff brought an action seeking a writ of superintending control in August 1992,[1] alleging that defendant denied Free Press photographers access to court proceedings on five occasions over a six-month period, and had a standing policy never to allow cameras in his courtroom, which he had stated on the record. Plaintiff alleged defendant's blanket exclusion of cameras and failure to make findings and articulate them on the record violated Supreme Court Administrative Order No.1989-1 (AO 1989-1), which states:[2]

Film or Electronic Media Coverage of Court Proceedings

The following guidelines shall apply to film or electronic media coverage of proceedings in Michigan courts:

2. Limitations.

(a) Film or electronic media coverage shall be allowed upon request in all court proceedings. Requests by representatives of media agencies for such coverage must be made in writing to the clerk of the particular court not less than three business days before the proceeding is scheduled to begin. A judge has the discretion to honor a request that does not comply with the requirements of this subsection. The court shall provide that the parties be notified of a request for film or electronic media coverage.

(b) A judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion, that the fair administration of justice requires such action, or that rules established under this order or additional rules imposed by the judge have been violated. The judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses.

(c) Film or electronic media coverage of the jurors or the jury selection process shall not be permitted.

(d) A trial judge's decision to terminate, suspend, limit, or exclude film or electronic media coverage is not appealable, by right or by leave.

3. Judicial Authority. Nothing in these guidelines shall be construed as altering the authority of the Chief Justice, the Chief Judge of the Court of Appeals, trial court chief judges, or trial judges to control proceedings in their courtrooms, and to ensure decorum and prevent distractions and to ensure the fair administration of justice in the pending cause.

*2 4. Equipment and Personnel. Unless the judge orders otherwise, the following rules apply:

(a) Not more than two videotape or television cameras, operated by not more than one person each, shall be permitted in any courtroom.

(b) Not more than two still photographers, utilizing not more than two still cameras each with not more than two lenses for each camera, and related necessary equipment, shall be permitted in any courtroom.

(c) Not more than one audio system for radio and/or television recording purposes shall be permitted in any courtroom ...

6. Location of Equipment and Personnel.

(b) Still camera photographers shall be positioned in such locations in the courtroom as shall be designated by the judge. Still camera photographers shall assume fixed positions within the designated areas and shall not move about in any way that would detract from the proceedings.

(b) Photographic or audio equipment may be placed in, moved about in, or removed from, the courtroom only during a recess. Camera film lenses may be changed in the courtroom only during a recess. [432 Mich. cxii-cxv.]

Following a hearing, the circuit court entered an order granting writ of superintending control on October 13, 1992, which stated in pertinent part that defendant:

... shall allow, upon proper request submitted not less than three business days in advance, pursuant to Supreme Court Administrative Order 1989-1, film or electronic media coverage of Court proceedings in his courtroom;

... may deny a three-day advance request only for reasons specifically related to the court proceeding for which coverage is requested, and in which the fair administration of justice requires such action. These reasons must be articulated on the record at the time the request is denied. It is not sufficient reason to deny coverage on the basis that the parties or witnesses involved must receive notification under the Administrative Order or give their consent;

IT IS FURTHER ORDERED that in all other respects, the Administrative Order of the Supreme Court controls request [sic] for electronic media coverage of proceedings before the Honorable David Martin Bradfield.

IT IS FURTHER ORDERED that the Court retains jurisdiction to enforce the terms of this Order.

This Court dismissed defendant's claim of appeal from this original writ of superintending control as untimely and denied his application for delayed appeal.

Following entry of the writ granting superintending control, plaintiff made additional requests to photograph proceedings in defendant's courtroom and, after requests were allegedly denied or limited, moved to show cause why defendant should not be held in contempt for violation of the order granting writ of superintending control. At a show cause hearing in October 1993, there was testimony that defendant continued to deny plaintiff's requests for media coverage or imposed conditions more restrictive than AO 1989-1. One of plaintiff's requests was filed three days in advance but was denied as untimely. Another request was denied because it did not identify a particular proceeding, but rather indicated coverage was sought of proceedings on a particular day. There was also testimony that, although defendant approved several requests, the approvals were subject to conditions defendant imposed which were set forth in a document entitled "Special Court Rules for the Press," and attached to the approvals. The document stated:

STATE OF MICHIGAN 36TH DISTRICT COURT HON. DAVID MARTIN BRADFIELD PRESIDING

SPECIAL COURT RULES FOR THE PRESS

*3 Pursuant to Michigan Supreme Court Administrative Order 1989-1(4) the following rules apply for authorized photo, video and audio coverage in this court and supersede the subsections (a)(b) & (c) of that order:

a. Not more than one camera whether videotape, television, or still photographic, shall be permitted in the courtroom. That camera shall be located centered in the last rearmost seat in the courtroom. No movement of the camera or its operator is allowed.

b. No camera is allowed more than one lense-wide angle with no zoom lense. Close ups of any person in the court is [sic] prohibited. The faces of all court personnel must be obstructed or made unrecognizable.

c. Only one audio system shall be permitted in the courtroom and is to be component with the camera or a wireless pick up at the location of the operator. No audio equipment will be allowed to be installed beyond the last rearmost seat in the courtroom.

David Martin Bradfield

Judge, 36th District Court

The circuit court determined defendant violated the initial order and issued a Supplemental Order of Superintending Control on October 22, 1993, which stated:

... that Judge Bradfield committed three separate violations of this Court's October 13, 1992 Order Granting Writ of Superintending Control, the Court being of the opinion that a Supplemental Order should be issued further restricting Judge Bradfield's power to make decisions regarding media access to his courtroom in light of his violations of the Superintending Control Order ...

[1] IT IS ORDERED that Judge Bradfield must grant all requests for film or electronic media coverage of court proceedings, whether or not the request is made three business days before the proceeding;

[2] IT IS FURTHER ORDERED that the request for film or electronic coverage of court proceedings need not specify a particular case;

[3] ... that the only proceedings for which Judge Bradfield has discretion to exclude film or electronic media coverage are those specifically enumerated in the last sentence of [paragraphs] 2(b), and in 2(c), of Supreme Court Administrative Order 1989-1;

[4] ... that Judge Bradfield can give reasonable directions to media regarding where any film or electronic cameras can be located in his courtroom when absolutely necessary to prevent disruption in the Court in a particular proceeding;

[5] ... that Judge Bradfield's authority to limit film or electronic media coverage is restricted to those situations set forth in this Supplemental Order, and shall be construed narrowly;

[6] ... that Judge Bradfield's "Special Court Rules for the Press," dated January 1, 1993 are VACATED, and Judge Bradfield shall not promulgate any such rules;

[7] ... that, if Judge Bradfield believes that news organizations are abusing their rights under this Order, or if he feels there is an ambiguity in this Supplemental Order, it shall be incumbent upon Judge Bradfield to file a motion in this Court seeking clarification or amendment of this Supplemental Order or of the October 13, 1992 Order;

*4 [8] ... that Judge Bradfield's Motion for a Stay of this Supplemental Order is Denied.

I

Defendant's initial argument, that the circuit court lacked authority to issue a writ of superintending control in the first instance, is not properly before us. Defendant concedes he was unsuccessful in his appeal from the original order. In any case, we believe the circuit court had both jurisdiction, MCR 3.302(D), and authority to issue the original order. *Lockhart v Thirty-Sixth District Judge*, 204 Mich.App 684, 688; 516 NW2d 76 (1994).

Generally, for superintending control to lie, a plaintiff must establish the absence of an adequate legal remedy and that the defendant failed to perform a clear legal duty. *Id.* As defendant concedes, the first prong is met. AO 1989-1(2)(d) expressly states that "a trial judge's decision to terminate, suspend, limit, or exclude film or electronic media coverage is not appealable, by right or by leave." Defendant argued below the second prong was not met, that he did not fail to perform a clear legal duty, i.e., he did not violate AO 1989-1, but rather applied his interpretation of it, with which the circuit court differed.[3]

By its terms, all Michigan courts are subject to and bound by AO 1989-1. *See, e.g., Frederick v. Presque Isle Judge*, 439 Mich. 1, 9; 476 NW2d 142 (1991). Administrative orders are binding until changed or modified by the Supreme Court. *Detroit & Northern v. Woodworth*, 54 Mich.App 517, 520; 221 NW2d 190 (1974). The circuit court properly determined defendant's general and non-particularized policy of excluding photographic coverage violated his clear legal duty under AO 1989-1.[4]

The circuit court's initial order mandated compliance with AO 1989-1's requirement that denials of or limitations on timely requests for media coverage be articulated on the record, and precluded blanket exclusions of media coverage, in keeping with the AO's spirit that media coverage be allowed.

II

However, the supplemental order of superintending control, which defendant argues is overly broad, exceeded the dictates of AO 1989-1, and to the extent it did, we agree with defendant that the circuit court exceeded its superintending control power.

> The superintending court does not substitute its judgment or discretion for that of the magistrate; neither does it act directly in the premises. Rather it examines the record made before the magistrate to determine whether there was such an abuse of discretion as would amount to a failure to perform a clear legal duty; and in such case, the superintending court orders the magistrate to perform his duty. [*Cahill v. Fifteenth Dist Judge*, 393 Mich. 137, 143; 224 NW2d 24 (1974), quoting *People v. Flint Municipal Judge*, 383 Mich. 429; 175 NW2d 750 (1970).]

Defendant was bound to obey AO 1989-1, and to obey the order of superintending control, as it was entered by a court with proper jurisdiction. *In the Matter of Hague*, 412 Mich. 532, 544-545; 315 NW2d 524 (1982). We conclude that the circuit court did not abuse its dscretion in determining defendant's special rules for the press, which by their own terms "superseded" AO-1989-1, violated the original writ of superintending control, as did his denials of certain press requests. Although the circuit court's issuance of a supplemental order under those circumstances was not an abuse of discretion, the supplemental order, in the paragraphs we have numbered [1], [3], and [5], goes beyond ordering defendant to perform his legal duties. We thus vacate those provisions. We note that the initial order, which remains undisturbed, will fill any void created by our vacating the three paragraphs.

*5 Affirmed in part, and vacated in part.

All Citations

Not Reported in N.W.2d, 1996 WL 33364376, 24 Media L. Rep. 1886

Footnotes

* Circuit judge, sitting on the Court of Appeals by assignment.

1 *In Re: Detroit Free Press, Inc., and Post-Newsweek Stations, Michigan, Inc.* Post-Newsweek Stations (WDIV) is not a party to this appeal. Plaintiff's August 1992 complaint stated that plaintiff and WDIV had previously unsuccessfully sought superintending control, civil action no. 92-210036-AS, and that the circuit court had ruled at a hearing in that matter that if defendant had a blanket rule against camera coverage such a rule would violate AO 1989-1, and that the circuit court would take action.

2 AO 1989-1 and its predecessors were adopted as an exception to the Michigan Code of Judicial Conduct's Canon 3A(7), which prohibits broadcasting, televising, recording or taking of photographs in Michigan courtrooms "except as authorized by the Supreme Court." See 429 Mich. xcix, at ciii-civ.

> The predecessor to AO 1989-1, AO 1988-1, was adopted "to permit film or electronic media coverage in all Michigan courts except the juvenile division of the probate court ...", 429 Mich. xcix, following a one-year experimental program. See AO 1987-4, 428 Mich. cxl. AO 1989-1 pertains to all Michigan courts and took effect on March 1, 1989. 432 Mich. cxii.

3 Defendant argued the circuit court's superintending control power was limited to ordering defendant to articulate on the record his reasons for denying or limiting media access.

4 Following argument at the September 1992 hearing, the circuit court noted:

> ... my mandamus would merely say, any request that meets the procedural requirement of the Administrative Order may not be denied, absent a specific finding on the record that it will be disruptive in a particular case.
>
> And, unless you've got something else to say, I'm going to grant the writ.
>
> [*Defense counsel*]: The only thing I would say, your Honor, is I think that goes further and that intrudes upon the discretion of the lower court tribunal.
>
> *THE COURT:* Well, I know. But, that's the major issue here. Whether the discretion goes to a judge's blanket conclusion that cameras are always disruptive, or whether the Administrative Order already finds that cameras are not disruptive on a blanket basis, but can be on an individual basis.
>
> And, my view of the law is the latter.
>
> [*Defense counsel*]: It must be an individual finding?

THE COURT: Right. Okay. I will grant it. And based on that, please prepare a writ of mandamus and submit it.